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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-154

POTOMAC ELECTRIC POWER COMPANY,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, PEOPLE'S COUNSEL OF THE DISTRICT OF COLUMBIA,

Respondents.

BRIEF IN OPPOSITION FOR PEOPLE'S COUNSEL

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BRIEF IN OPPOSITION FOR PEOPLE'S COUNSEL

Respondent, People's Counsel of the District of Columbia,[1] respectfully prays that the Petition for Writ of Certiorari in this matter be denied, for the reasons set forth herein.

[1]The People's Council was established by D.C. Code 1977 Supp., §43-205, as an office within the District of Columbia Public Service Commission, to represent and protect the interests of consumers in matters under the jurisdiction of the Commission.

Respondent, People's Counsel of the District of Columbia, respectfully prays that the Petition for Writ of Certiorari in this matter be denied, for the reasons set forth herein.

OPINIONS BELOW

Respondent People's Counsel concurs in the statement made by the petitioner Potomac Electric Power Company on this matter.

JURISDICTION

People's Counsel concurs in the statement made by the petitioner Potomac Electric Power Company on this matter.

QUESTION PRESENTED

Should certiorari to the District of Columbia Court of Appeals be granted because that court dismissed as moot an appeal from a Public Service Commission order denying interim rate increases of approximately $24 million to a utility, when the company does not contend that it met the criteria for interim rates, when those criteria are generous to the utility, and when the whole issue is rendered hypothetical by a subsequent commission order authorizing a permanent rate increase of more than $29 million?

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the Constitution of the United States:

> The judicial Power shall extend to all Cases, in Law and Equity, under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime jurisdiction; — to controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

Petitioner Potomac Electric Power Company (hereafter "PEPCO" or "the Company") is a public utility and is subject to the jurisdiction of the District of Columbia Public Service Commission (hereafter "the Commission"). PEPCO applied to the Commission for an interim rate surcharge designed to produce an increase in revenues of $23,938,000 on an annual basis. This application was filed on December 29, 1975 simultaneously with a request by PEPCO for a permanent increase in rates designed to obtain additional revenues in the amount of $52,324,000 from the Company's D.C. customers. These applications

were filed only sixteen days after the effective date for new rates which had just been approved by the Commission, and which were designed to increase the Company's District of Columbia operating revenues by $27,657,000 annually. The Company prepared its request for interim rate relief prior to experiencing the impact of the rates which became effective December 13, 1975 and increases awarded in other jurisdictions which altered the financial picture of the enterprise. The evidence presented on the interim case showed that the Company's financial circumstance had improved from the December 1975 filing date to the March 16, 1976 hearing date. The record showed that the selling price of the Company's common stock, for example, had increased from the $10½-$11½ range, at which it sold about the time of the filing, to $12-⅜, at which it sold on March 15, 1976 (T. 121). The Company's earnings per share, which dropped below its $1.16 dividend rate in 1975, were back up to $1.19 per share for the twelve months ending January 31, 1976 (T. 103), a period only one month later, and, as shown by Moody's Public Utility Manual, were $1.71 per share for 1976. Even without a permanent rate increase from the Commission, the Company projected its ratio of earnings to fixed charges at 2.7 by year-end 1976. According to PEPCO's president, a ratio of only 2.5 is required to continue the Company's A long-term debt rating by Moody's (T. 64).

PEPCO's assertions to the Commission that it would be unable to obtain necessary financing absent interim relief were unfounded. The Company's president and vice president told the Commission under cross-examination

that the Company expected its $200,000,000 in bank lines of credit to be renewed (T. 100, 101, 109, 51); that they could not forecast a downrating from the A+ rating to which the Company's long-term debt had been upgraded by Standard and Poor's in August 1974 (T. 92) if interim relief were not granted (T. 107); that more than 36 companies were downrated between 1974 and 1975, some to triple B by Moody's, which were able to market debt, and that the Company expected to generate virtually all construction expenditures internally (T. 59, 60, 66). Based upon this record the Commission concluded that PEPCO could continue to attract capital and meet its public service obligations. The Commission therefore declined to grant the extraordinary interim rate increase as PEPCO had requested.

PEPCO filed an Application For Reconsideration on April 29, 1976, and after denial thereof, on May 17, 1976, the Company appealed to the District of Columbia Court of Appeals. Meanwhile, the Company's application for a permanent rate increase was pending before the Commission, and was proceeding according to an expedited schedule stipulated by the parties and accepted by the Commission. On December 31, 1976 the Commission issued its decision with respect to PEPCO's permanent rate application, granting $29,400,000 in permanent rate relief, thereby making moot PEPCO's appeal of the denial of interim rate relief. Accordingly, on January 14, 1977, the Commission filed a motion with the Court of Appeals seeking dismissal of the appeal as moot,[2]

[2] The application for an interim increase had sought to augment revenues by approximately $24 million; the decision on a permanent increase granted over $29 million.

which motion was subsequently granted. PEPCO filed a petition for rehearing or rehearing *en banc*, which the Court of Appeals denied in a *per curiam* order on May 8, 1979.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals dismissing PEPCO's petition was correct, as the subsequent order of the Commission providing a permanent rate increase to PEPCO rendered the question of temporary relief moot. The District of Columbia Public Service Commission (hereafter "the Commission") establishes permissible utility rates according to the statutory scheme set forth by the D.C. Code 1973, Title 43 (hereafter "the Act"). That statute provides that new rates may take effect only after the Commission has conducted a hearing and issued an order based upon the record in that hearing (Section 43-401). It is a cardinal principle of the ratemaking process that established rates are not intended to *guarantee* a utility a fair rate of return, only the opportunity to earn it. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942). Once rates have been set to produce a fair return, the utility runs the risk of earning a greater or lesser rate of return. If the existing rate structure proves inadequate in producing a fair return, the utility may apply for new rate relief. Until such relief is granted, the utility must continue to charge only the previously authorized rates. During the interim between an application for new rates and a Commission decision after full hearing thereon, the utility bears the risk that revenues earned under the old rates will be inadequate. *Chesapeake & Potomac Telephone Company* v. *PSC*, 330 A.2d 236 (D.C.App.

1974). This fact is underscored by the absence of any express authority in the Act for the Commission to authorize interim rate relief. The Commission's authority to authorize such relief is an implied power only, D.C. Code 1973, Section 43-1003, and for that reason the Court of Appeals of the District of Columbia has admonished the Commission to exercise that power "with restraint." *Chesapeake & Potomac Telephone Company*, *supra* at 243.

The criteria for interim relief formulated by the Commission are as follows:

> (1) [A] present or clearly imminent threat that the utility will be unable to continue to meet its public service obligation; (2) a present or clearly imminent threat that the utility will be unable to obtain capital funds, and (3) that the utility's earnings produce a rate of return substantially less than reasonable.

Commission Order No. 5707 (A.2a).

The facts on the record before the Commission clearly establish that PEPCO failed to meet these criteria. Nor does PEPCO now contend to the contrary. Having failed to meet the established criteria, however, the Company now protests that these criteria are unreasonable as a matter of law or unconstitutional. This argument proceeds upon the erroneous premise that interim relief must be granted to close any gap which exists between the previously authorized rate of return and the Company's projected actual rate of return. This premise is, as we shall show, untenable on its face; moreover, it misinterprets the law and

would amount to the establishment by the Commission of interim relief as a mechanism designed to guarantee a certain rate of return as quickly as the new application can be filed and interim relief considered. This interpretation is completely contrary to the established precepts that regulation does not insure a certain earnings level to a regulated company nor guarantee a certain rate of return. *Federal Power Commission* v. *Natural Gas Pipeline Co., supra* at 747. PEPCO seeks to subvert this principle by asserting its entitlement as a matter of law to an interim "make whole" allowance.

The Commission's established criteria for granting interim rate increases are similar to those adopted by variety of other regulatory commissions,[3] and are fair and reasonable, if not overgenerous. The only constitutional proscription relating to the interests of investors in a utility is that the ratemaking process must give the utility the opportunity to earn a fair return. If the utility fails to realize the return found reasonable, it has the right to petition for new rate relief. It does not follow, even assuming a failure in fact to realize a fair return, that the utility must be granted interim "make whole" relief while an application for permanent rate increase is pending. There is no contrary principle to be found in *Smith* v. *Illinois Bell Telephone*, 282 U.S. 133 (1930), upon which petitioner relies. *Smith*

[3] See *Re Citizens Utility of California*, 89 PUR3d 334 (1971); *Re Public Service Electric and Gas Company*, 6 PUR4th 302 (1974); *Re Indianapolis Power and Light Company*, 88 PUR3d 401 (1971); *Re Wisconsin Michigan Power Company*, 99 PUR3d 519 (1973); *Re Madison Gas and Electric Company*, 10 PUR4th 185 (1975); *Re Michigan Consolidated Gas Company*, 88 PUR3d 168 (1971); *Re Con Ed Company of New York, Inc.*, 10 PUR4th 436 (1975).

stands for the proposition that a state commission cannot establish permanent rates without separating out costs and revenues properly allocable to interstate activity, over which the Interstate Commerce Commission has jurisdiction. The rates which PEPCO could lawfully charge, however, had just been set by the Commission in a previous hearing on the basis of proper cost-of-service and revenue allocations. The denial of an interim increase in these rates did not amount to "setting" rates on a systemwide basis. Rather, the Commission had to establish whether the company was in such desperate straits that emergency measures, outside the statutory process, would be warranted. Whether the circumvention of the statutory process and ordinary method of rate-setting should be suspended in order to avoid dire consequences depends on the Commission's view of the Company's systemwide financial condition. Consideration of systemwide factors in this limited circumstance was within the Commission's authority and did not violate any constitutional prohibition.

Indeed, the basic result for which PEPCO argues is one which would be counter-productive for PEPCO. PEPCO argues that it must be allowed an interim rate increase (not provided for in the statute) if its District of Columbia business is not producing an adequate rate of return. But it is the allocations among jurisdictions and the determination of the validity of the claimed costs that lead to great differences of opinion at hearing. If PEPCO is correct, it would be necessary to have a full determination of the major contested issues in a rate case before it could obtain interim relief; in the time it takes to resolve these issues, the Commission could be acting on the permanent rate increae filing, and avoiding additional delay, detrimental to PEPCO, in authorizing new permanent rates.

What PEPCO really wants is a test which is easier for it to meet. People's Counsel is unable to ascertain from the petition precisely what standard PEPCO urges this Court to impose, as a matter of constitutional law, on the Commission's consideration of interim increases. Apparently the legal argument here is still in its infancy.[4] The Commission's existing test, however, is less harsh than that envisioned by the Supreme Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Together these cases establish that the (then) Federal Power Commission could not authorize a change in certain rates for gas or electricity except in dire circumstances. The Court ruled that a contract rate is not "unreasonable" just because it is "unprofitable" for the selling utility. The only basis for setting aside contract prices is when such prices "might impair the financial ability of the public utility *to continue its service . . .*" *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra* at 355. (emphasis supplied). In other words, the Commission can modify rates only when the jurisdictional rate will force the restriction of all services, jurisdictional and non-jurisdictional. This is analogous to the situation here. While the Commission's test may well be more advantageous to the Company than the statute permits, there is no merit whatever in PEPCO's position on the subject.

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[4] Cf., Shakespeare, *As You Like It*, Act 2, Scene vii.

The Dismissal of PEPCO's Appeal On The Ground Of Mootness By The Court Of Appeals Was Appropriate

Federal judicial power extends only to matters in which an actual case or controversy is involved. Article III, Section 2 limits the jurisdiction of the courts to actual "cases" and "controversies," and there is no power in any court to extend its jurisdiction beyond the constitutionally imposed limits. See, *Marbury* v. *Madison*, 1 Cranch 137 (1803); *Osborn* v. *United States Bank*, 9 Wheat. 738, 819 (1824). The requirement that there be a "case" or "controversy" means that there must be a "real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be . . ." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-41 (1937); see also *Muskrat* v. *United States*, 219 U.S. 346, 356 (1911); *Federal Radio Comm'n* v. *Nelson Bros.*, 289 U.S. 266 (1933); *Coleman* v. *Miller*, 307 U.S. 433, 460-64 (1939).

No case or controversy existed between PEPCO and the Commission regarding PEPCO's request for interim relief, once the Commission awarded a permanent rate increase to PEPCO. No "interim" period existed once permanent rates were authorized. Moreover, since the D.C. Code 1973, §43-401 does not permit an award of retroactive rates under any circumstances, the matter no longer was "admitting of specific relief," as constitutionally required. *Aetna Life Ins. Co., supra.*

PEPCO relies on *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911) in an effort to confer jurisdication

on the Court of Appeals when none would otherwise exist. *Southern Pacific Terminal* recognized an exception to the doctrine that the courts will decide only actual controversies; when a particular defined legal issue is likely to recur, yet will evade judicial review due to its short duration, a court may decide to hear the matter. This exception has no real application to the situation of PEPCO following the Commission's denial of its application for extraordinary interim rates.[5] PEPCO was at that time charging rates which had just been authorized by the Commission, and which were designed to augment its District of Columbia operating revenues by more than $27 million. At the same time, the Commission was proceeding on PEPCO's most recent application for another permanent rate increase. The December, 1975, rate decision by the Commission was of course subject to the full range of

[5] The decision of the Court of Appeals to dismiss the appeal as moot was reasonable, even accepting (which we do not) PEPCO's argument that *Southern Pacific Terminal* applies. The "Southern Pacific Terminal" doctrine merely removes the mandate that the case *must* be dismissed as moot. As the Court of Appeals for the District of Columbia Circuit has observed, ". . . the constitutional power of a court to decide a contention presented on appeal does not define a constitutional duty." *Alton & Southern Railway* v. *Internat'l Ass'n of Machinists and Aerospace Workers*, 463 F.2d 872, 877 (D.C. Cir. 1972). The Court of Appeals decision declining to issue such an opinion was prudent in the circumstances here. PEPCO's complaint was notably dependent upon the specific factual context, and judicial intervention could only have had the effect of disrupting the orderly course of agency disposition.

agency and judicial hearing and review,[6] as was the permanent rate increase order issued in December, 1976, which made the denial of emergency interim relief a moot question. PEPCO's status was precisely that envisioned by the Congress when it enacted Section 43–401 of the D.C. Code, which authorizes utility rates to become effective only *after* a Commission hearing and an order upon the record. It may readily be conceded that PEPCO is highly likely to request interim rate increases in the future without being able to meet the present overgenerous standard set by the Commission or any other legal standard of which People's Counsel is aware, and to seek to appeal the interlocutory orders of the Commission which should deny the relief PEPCO has failed to justify.[7] That unfortunate fact is no justification, however, for seeking to invoke the process of this Court to direct the Courts of the District of Columbia and the Commission to impose, on constitu-

[6] In fact, PEPCO did seek judicial review of the order. The D.C. Court of Appeals, acting *en banc* to reverse a decision by a division of that court upheld the Commission in a decision which is now the subject of another petition for writ of certiorari filed by PEPCO. See No. 79-153.

[7] Judicial Review of Commission orders is governed by D.C. Code 1973, Title 43, §705. The statute provides for expedited treatment of proper appeals. People's Counsel does not concede that an order denying interim relief is a "final order or decision" within the meaning of §705. People's Counsel suggests that as an interlocutory ruling such an order is not appropriately within the purview of judicial review. That issue need not be reached at this time, however, because PEPCO's appeal is moot in any case. Although PEPCO makes much of the delay of the Court of Appeals in finally ruling on the Motion to dismiss the case as moot, the bulk of this delay occurred after the case had already been made moot in fact.

tional grounds, some amorphous standard which PEPCO itself is unable to state. PEPCO does not like the result which the Commission reached in applying that criteria, and so it is now complaining in a vague way that something must be wrong with the criteria. Yet PEPCO has not suggested any other criteria which in its opinion would be "constitutional," nor has it suggested what relief might be granted to it now that the Commission's decision has been rendered moot.[8] This thrashing and complaining without basis is far afield from any legitimate and important issue to which this Court ought to address its attention.

CONCLUSION

For the reasons stated herein, People's Counsel respectfully urges that this Court deny the petition for a writ of certiorari to the District of Columbia Court of Appeals.

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[8] The Company's position is so utterly lacking in merit that it would render highly dubious any future claim PEPCO might make to the Commission that the costs incurred in this litigation should be included as an expense in setting new rate levels.

Respectfully submitted,

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